favor of the Trustee Schilling ordering the disgorgement by Petitioner of $153,477.71, representing all moneys paid to Petitioner by TSR within the year preceding bankruptcy. Twice the District Court reversed the bankruptcy court and ordered that an evidentiary hearing be conducted on the issues.

Accordingly, the Bankruptcy Court scheduled the case for trial on January 10, 2002. Based on the hearing the bankruptcy court made the following relevant factual findings:

(1) From 1988 to 1991 Petitioner provided services to Triple S at the rate of $125 per hour. (Pet. Apx. A30).

(2) By November 1992, Triple S owed Petitioner approximately $30,000 in accrued but unpaid attorney fees, and the parties entered into a Retainer Agreement whereby Triple S agreed to pay Petitioner $10,000 per month plus expenses. (*id.*).

(3) in May 1994 Petitioner began deducting his expenses from the $10,000 retainer "in an effort to assist [Triple S] with its cash flow problem." (Pet. Apx. A31).

(4) Triple S filed for bankruptcy in September 1994. (Pet. Apx. A30).

(5) David P. Chinn was the Debtor's bankruptcy counsel. (Pet. Apx. A29).

(6) Petitioner "provided substantial services to Triple S during the year prior to the bankruptcy filing, including litigation management, services related to employee and customer complaints, numerous attempts at debt restructuring, and day-to-day legal consultation, all of which consumed the [Petitioner]'s law practice during this time frame." (Pet. Apx. A31).

(7) Petitioner received $153, 477.71 within the year

preceding bankruptcy.[1] (Pet. Apx. A35).

(8) The $153,477.71 received by Petitioner in the year preceding bankruptcy was disclosed by Chinn in the Statement of Financial Affairs as a payment to an insider because Chinn believed such disclosure was proper given Petitioner's familial relationship with a former director of Triple S. (Pet. Apx. at A29-A30).

Thereafter, the Bankruptcy Court entered Judgment against Petitioner which included a "sanction" against Petitioner for violation of the disclosure requirements of Bankruptcy Code § 329 and Bankruptcy Rule 2016(b). The Bankruptcy Court entered Judgment in the amount of $46,043.32, representing 30% of all fees paid to Petitioner by TSR within the year preceding bankruptcy. (Pet. Apx. A34-A35). Despite finding Petitioner provided substantial services to TSR within the year preceding bankruptcy, the Bankruptcy Court nonetheless sanctioned Petitioner based its legal conclusion that Petitioner had a duty pursuant to Section 329 and violated that by failing to file the required disclosure statement.

Upon appeal, the District Court held that Bankruptcy Code § 329 and Bankruptcy Rule 2016(b) do not apply to attorneys who are not representing the debtor in the bankruptcy proceeding and consequently reversed the Bankruptcy Court sanctions against Petitioner based on those provisions of the Code. *In re Triple S Restaurants,*

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[1] The bankruptcy court heard testimony that Petitioner received a *gross* amount of $153,771; that of this, $24,774.27 was placed in escrow by Petitioner on TSR's behalf to pay court costs, liquor licenses and miscellaneous attorney fees to other lawyers; and that an additional $27,564.26 was paid by Petitioner from the gross amount to other attorneys and for court costs. This left Petitioner with approximately $101,000 net receipts from TSR in the year preceding bankruptcy.

Inc., 306 B.R. 191, 195-96 (W.D.Ky. 2004); (Pet. Apx. A20-A21).

The District Court's opinion was well reasoned and correct. Petitioner's testimony at the bankruptcy hearing was uncontroverted in every regard. Petitioner testified as to the reasonableness of fees and the hours he spent representing TSR. No rebuttal testimony was proffered, nor any expert testimony. Petitioner worked for TSR under a classic retainer agreement. All fees paid to Petitioner were earned at the time they were received and, therefore, his fees are not part of the debtor's estate. The retainer agreement between TSR and Petitioner was made two years before the filing of the Chapter 7 and twenty-one (21) months before the filing of the Chapter 11 and, therefore, cannot be challenged by the Trustee as a matter of law.

Chinn represented TSR in bankruptcy and prepared the Petition and Statement of Financial Affairs. It was Chinn's professional opinion that the fees paid to Petitioner by TSR were properly disclosed within the Petition as Payments to insiders. Petitioner had no role in the decision and was not an attorney for the debtor in bankruptcy. The sanction by the bankruptcy court against Petitioner under these uncontroverted facts was an abuse of discretion.

The Sixth Circuit, in an unpublished decision, reversed the District Court. *In re Triple S Restaurants, Inc.*, 130 Fed. Appx. 766 (6^{th} Cir. 2005) (not to be published) (Pet. Apx. at A1). Avoiding the dispositive statutory language, which by its terms limits the duty to make disclosures to an attorney "representing a debtor in a case under this title, or in connection with such a case," 11 U.S.C. § 329(a), the Sixth Circuit held that because Petitioner's pre-petition services were rendered "in

contemplation of bankruptcy,"[2] therefore Petitioner had a fiduciary obligation to the bankruptcy court to file § 329 disclosures. 130 Fed. Appx. at 772; Pet. Apx. at A10-A11. The Sixth Circuit concluded that the bankruptcy court's order of partial disgorgement, "in order to uphold the provisions of the Bankruptcy Code and encourage compliance with its requirements," was a justifiable sanction for Petitioner's failure to file § 329 disclosures. *Id.* at 772-73; Pet. Apx. at A12.

This Court must grant the petition for writ of certiorari because the Sixth Circuit's unpublished decision is an unprecedented judicial expansion of the narrow language of § 329, which limits the duty of disclosure to those attorneys actually participating in bankruptcy proceedings, and the retroactive application of this judicial rewriting of the Bankruptcy Code to Petitioner denied him due process of law.

REASONS FOR GRANTING THE WRIT

The issue presented in this case is of practical importance to all legal practitioners generally in that the decision by the Sixth Circuit marks an unprecedented departure from the application of Bankruptcy Code § 329 and Bankruptcy Rule 2016(b), exposing all attorneys to potential sanctions by the bankruptcy courts whether or not that attorney practices bankruptcy law or even represents a debtor in bankruptcy. The decision by the Sixth Circuit Court of Appeals in essence creates an obligation upon any attorney who represents a person or

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[2] As to the issue of whether services are rendered "in contemplation of bankruptcy," it must be noted that "the controlling issue is with respect to the state of mind of the debtor and whether the thought of the bankruptcy was the impelling cause of the transaction." 130 Fed. Appx. 772, Pet. Apx. A9 (quoting *Conrad, Rubin & Lesser v. Pender*, 289 U.S. 472, 477 (1933)).

entity that later files bankruptcy to fulfill the disclosure obligations under Bankruptcy Code § 329 and Bankruptcy Rule 2016(b), even if that attorney does not represent the debtor in bankruptcy. Additionally, this judicial rewriting of the Bankruptcy Code, as applied retroactively to Petitioner in an unpublished decision that lacks prospective applicability to others, violates due process.

I. AN ATTORNEY WHO DOES NOT PARTICIPATE IN BANKRUPTCY PROCEEDINGS DOES NOT HAVE A DUTY TO SUBMIT DETAILED DISCLOSURES OF ALL PRE-PETITION PAYMENTS RECEIVED, PURSUANT TO 11 U.S.C. § 329 AND BANKRUPTCY RULE 2016, AND THE BANKRUPTCY COURT HAS NO JURISDICTION TO SANCTION AN ATTORNEY NOT PARTICIPATING IN BANKRUPTCY PROCEEDINGS FOR FAILING TO MAKE SUCH DISCLOSURES.

Section 329 requires "any attorney *representing a debtor in a case under this title, or in connection with such case*" to file a statement of compensation received from the debtor within the year preceding filing of the petition. 11 U.S.C. § 329(a) (emphasis added). The §329 disclosure requirement for the debtor's attorney in bankruptcy is implemented by Bankruptcy Rule 2016, which requires attorneys to file the §329 disclosure within fifteen (15) days after the order for relief. Fed. R. Bank. P. 2016(b), entitled "Disclosure of compensation paid or promised to attorney for debtor."

In this case, the District Court held:

By its terms §329 applies only to attorneys for the debtor and does not apply to counsel generally who provided services for a corporation prior to bankruptcy. The Court cannot find a single case in which a court applied the §329 obligations to pre-petition counsel. Now reading the provision, the words seem so clear that the Court is uncertain how one could state a view so confidently to the contrary."

In re Triple S Restaurants, Inc., 306 B.R. 191, 195; Pet. Apx. A20.

In reversing the District Court, the Sixth Circuit made no reference to §329's language that the duty of disclosure attaches only to an attorney *"representing a debtor in a case under this title, or in connection with such case."* 11 U.S.C. § 329(a) (emphasis added). Instead the Sixth Circuit focused exclusively on the nature of the pre-petition services to determine the applicability of § 329's duty of disclosure, stating, "Once it is established that the fees Triple S paid to Heavrin were for services in contemplation of the filing of a bankruptcy petition, it follows that Heavrin had a fiduciary duty to file a Section 329 statement." *In re Triple S Restaurants, Inc.*, 130 Fed. Appx. 766, 772; Pet. Apx. A11.

To reach this conclusion, the Sixth Circuit relied almost exclusively on *Conrad, Rubin & Lesser v. Pender*, 289 U.S. 472 (1933), a bankruptcy case based on § 60d of the former Bankruptcy Code, which provided as follows:

(d) If a debtor shall, directly or indirectly, in contemplation of the filing of a petition by or against him, pay money or transfer property to an attorney and counselor at law, solicitor in equity, or proctor in admiralty for services to be rendered, the transaction shall be reexamined by the court on petition of the

trustee or any creditor and shall only be held valid to the extent of a reasonable amount to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate.

In *Conrad*, the attorneys challenged the bankruptcy court's jurisdiction to reexamine a payment made to them for their services in negotiating a settlement with the debtors' creditors by the debtor twelve (12) days before the debtor filed bankruptcy. This Court concluded that such services were "in contemplation of the filing of a petition" and the court had jurisdiction to reexamine the transaction to determine if the payment was reasonable. "[G]iven the fact that the payment or transfer was in contemplation of bankruptcy, the inducement of the transaction affords, from the standpoint of the statute, sufficient ground for authorizing a summary inquiry into its reasonableness." *Id.* at 477.

The Sixth Circuit's reliance on *Conrad* to apply §329 to this case was misplaced, due to the difference between §329 and former §60d. Under §329, the inquiry is not simply whether the nature of the services provided was in contemplation of bankrupcty as it was under §60d. Rather for §329 to apply, it is a prerequisite that the attorney who provided the services in question is the same attorney *representing the debtor in bankruptcy.* As the *Conrad* Court noted, "The test of jurisdiction, we repeat, is given by the express language of the statute." *Supra*, 289 U.S. at 478. In this case, the Sixth Circuit ignored the express language of the statute which gives the court jurisdiction only over an attorney who is *"representing a debtor in a case under this title, or in connection with such case."* 11 U.S.C. § 329(a) (emphasis added).

Thus, under the Sixth Circuit's analysis, *any* attorney who has provided services to an entity within the year

preceding that entity's filing of bankruptcy has a duty to file a §329 statement if such services were in contemplation of bankruptcy. Such interpretation makes the qualifying language of the statute – limiting the duty to disclose to "any attorney *representing a debtor in a case under this title, or in connection with such case*" – superfluous.

While the Historical and Statutory Notes to §329 state that §329 is derived "in large part" from former Bankruptcy Act section 60d [section 96(d) of former Title 11], the different language of the two statutes reveals that §329 does not simply replace §60d and that the two statutes are in fact very different.

Section 60d conferred jurisdiction on the bankrupcty court to reexamine transactions between attorneys and debtors who were, at the time, contemplating filing bankruptcy. This examination was limited to the determination of whether such transactions were reasonable. In essence, it created a suspect class of transactions which the bankruptcy court had the power to review. It did not, however, impose upon the attorneys involved in such transactions a duty to disclose such transactions, file documents with the bankruptcy court, or otherwise subject themselves to the court's jurisdiction.

By contrast, §329 confers jurisdiction on the bankruptcy court to scrutinize the debtor's fee arrangement and payments to the attorney representing the debtor in bankruptcy. Pursuant to this jurisdiction, the debtor's attorney in bankruptcy has an affirmative duty to file a disclosure statement with the bankruptcy court. This disclosure is required pursuant to the "fiduciary duty" owed by the attorney to the bankruptcy court pursuant to the inherent power of the court over attorneys appearing before it. "There can be no doubt that, as counsel for [the debtor] in the bankruptcy

proceeding, [debtor's attorneys] subjected itself to the power of the bankruptcy court." *In re Hargis,* 887 F.2d 77 (5th Cir. 1989). Indeed the Sixth Circuit has previously recognized that "Section 329 and Rule 2016 are fundamentally rooted in the fiduciary relationship between attorneys and the courts." *In re Downs,* 103 F.3d 472, 480 (6th Cir. 1996). This statement recognizes that §329 and Rule 2016 apply to those attorneys who stand in a relationship to the bankruptcy court. Conversely, an attorney who engages in pre-petition transactions with an entity which later becomes a "debtor" in bankruptcy court does not stand in a relationship to the bankruptcy court unless that attorney is an "attorney *representing a debtor in a case under this title, or in connection with such case.*" 11 U.S.C. § 329(a).

The disclosure requirement of § 329 serves the purpose of enabling the court to supervise attorneys representing debtors. A primary reason for such supervision is so the court may discern any conflicts which may exist between the debtor's attorney and the bankruptcy estate.

> Proper disclosure and evaluation of fee arrangements are required by 11 U.S.C. § 329 as necessary in the early stages of the case not onl .o avoid remedial adjustment of fees in later stages of the case but also to prevent the escalation of a potential conflict into an actual one. If allowed to percolate without proper disclosure, a conflict may mature and either disrupt the case to the detriment of the debtor, creditors or the estate or simmer below the horizons of view by the Court or creditors, thereby accomplishing real damage unperceived until incurable, except by disgorgement or disallowance of fees. Other "unattractive options" may be necessary, including appointment of a trustee with its associated expense,

> removal of counsel with its implications on the ability to reorganize, and continuation of the case in spite of the conflict with its attendant risks. Such a result would affect not only the debtor's attorneys but also the estate and its creditors.

Halbert v. Yousif, 225 B.R. 336 (E.D. Mich. 1998) (citing *In re Automend, Inc.,* 85 B.R. 173, 178 (Bankr. N.D.Ga.1988)); *see also In re Devers,* 33 B.R. 793, (D.D.C.), *appeal dismissed,* 729 F.2d 863 (D.C. Cir. 1983) (It is duty of counsel for debtor in a bankruptcy proceeding to disclose fully to the court all connections that may exist between counsel and debtor, the creditors, and any party in interest, and failure to file a disclosure statement under former Bankruptcy Rule 219 was a violation of former rules and of fiduciary obligations owed to court); *see also In re Big Rivers Electric Corp.,* 355 F.3d 415 (6th Cir. 2004) (bankruptcy examiner denied compensation for failure to make necessary disclosures under § 329, which would have revealed conflict of interest); *In re Georgetown of Kettering,* 750 F.2d 536 (6th Cir. 1984) (counsel denied all compensation due to conflict of interest).

> 'The bankruptcy court must ensure that attorneys who represent the debtor do so in the best interests of the bankruptcy estate.' *Neben & Starrett Inc. v. Chartwell Financial Corp. (In re Park-Helena Corp.),* 63 F.3d 877, 880 (9th Cir.1995), *cert. denied,* 516 U.S. 1049 (1996). A court cannot properly perform this statutory duty without full disclosure. To satisfy the court's need for information, the Bankruptcy Code and Rules impose various disclosure requirements on attorneys who seek to represent a debtor. [Citing 11 U.S.C. §329, Federal Rules of Bankruptcy Procedure, Rules 2014 and 2016] Complete and accurate disclosure by

> attorneys is required to permit the court to make informed decisions regarding their employment.

In re Fretter, Inc., 219 B.R. 769, 776 (N.D. Ohio 1998).

Further evidence to support this rationale is found in § 329's place in the Bankruptcy Code itself. Section 329 falls under Chapter Three (3) of Title Eleven (11), entitled "Case Administration" and in between Section 327 entitled "Employment of professional persons" and Section 330 entitled "Compensation of officers." These provisions deal with the court's inherent authority to supervise the administration of the bankruptcy estate, which only comes into being when the debtor files the bankruptcy petition. A bankruptcy court's authority to sanction a debtor's attorney for violation of the duty to disclose is "grounded in the inherent authority over the debtor's attorney's compensation." *In re Lewis*, 113 F.3d 1040, 1045 (9th Cir. 1997); *In re Kisseberth*, 273 F.3d 714, 721 (6th Cir. 2001) ("bankruptcy courts have broad and inherent authority to deny any and all compensation where an attorney fails to satisfy the requirements of the Code and Rules"); *Matter of Prudhomme*, 43 F.3d 1000, 1003 (5th Cir. 1995) ("Additionally, the court's broad discretion in awarding and denying fees paid in connection with bankruptcy proceedings empowers the bankruptcy court to order disgorgement as a sanction to debtors' counsel for nondisclosure.").

Because the duty to disclose (and the bankruptcy court's ability to sanction for nondisclosure) is rooted in the bankruptcy court's authority over attorney compensation, it is found in the midst of a chapter devoted to the administration of the bankruptcy estate. Section 327 deals with the bankruptcy court's supervision of attorneys employed by the trustee (or debtor in possession) and applications for employment as debtor's counsel; section 328 deals with the court's supervision of

other professionals employed by the trustee (or debtor in possession); section 330 deals with fee applications submitted by attorneys; and section 331 deals with interim payments to attorneys (including a "debtor's attorney") or other professionals.

Section 329 must be read *in pari materia* with the surrounding sections – which logically demands that section 329 be construed to impose a duty of disclosure only upon those attorneys who are involved in the administration of the bankruptcy estate. It is only those attorneys who owe a fiduciary duty to the bankruptcy court. And it is only those attorneys who are attorneys "*representing a debtor in a case under this title, or in connection with such case.*" 11 U.S.C. § 329(a).

In short, the disclosure requirements of §329 and Rule 2016 only apply to the debtor's bankruptcy attorney. As the District Court in this case correctly recognized:

> By its terms §329 applies only to attorneys for the debtor and does not apply to counsel generally who provided services for a corporation prior to bankruptcy. The Court cannot find a single case in which a court applied the §329 obligations to pre-petition counsel. Now reading the provision, the words seem so clear that the Court is uncertain how one could state a view so confidently to the contrary.
>
> ... [T]he Trustee sought disgorgement based on Heavrin's failure to comply with his duty to report fees under § 329. Absent a duty that the statute would impose if Heavrin was an attorney for the debtor, the Trustee cannot maintain a claim of disgorgement under § 329.

In re Triple S Restaurants, Inc., 306 B.R. 191, 195-96; Pet. Apx. A20-A21. Because Petitioner did not represent the debtor in bankruptcy he was not subject to the

disclosure requirements of §329 and he could not be sanctioned for failing to adhere to them.

Under the Sixth Circuit's interpretation, *every* attorney who represented a debtor in contemplation of bankruptcy before the debtor filed bankruptcy would be required to file a §329 disclosure statement. A hypothetical illustrates the unworkability of such an interpretation: If a multinational corporation begins experiencing financial difficulties, perhaps hundreds of attorneys will be rendering services (such as renegotiations of existing contracts) for the corporation "in contemplation of bankruptcy." If these efforts fail and the corporation files bankruptcy, each such attorney would have a duty to file, pursuant to § 329, disclosures to the bankruptcy court regarding his or her services. Each attorney who failed to disclose would be subject to sanctions which might include forfeiture of the pre-petition fees received. Such a result is clearly not contemplated by the Bankruptcy Code.

Importantly, this is not to say that the Bankruptcy Code does not authorize the Bankruptcy Court to examine pre-petition transactions between debtors and attorneys who are not representing the debtor in bankruptcy proceeding. Federal Bankruptcy Rule 2017 seems to be the true successor to former §60d. Rule 2017 does not have the same qualifying language found in the statute which limits the transactions to be examined only to those between the debtor and its bankruptcy attorney. In this way Rule 2017 more accurately mimics former §60d. Rule 2017(a) states:

> On motion by any party in interest or on the court's own initiative, the court after notice and a hearing may determine whether any payment of money or any transfer of property by the debtor, made directly or indirectly and in contemplation of the filing of a

> petition under the Code by or against the debtor or before entry of the order for relief in an involuntary case, *to an attorney* for services rendered or to be rendered is excessive.(Emphasis added).

Additionally, Rule 2017 does not have the disclosure requirements found in § 329 and implemented by Rule 2016. Rather, the court is simply called upon to determine the nature of the services performed and whether the fees were reasonable, or in the terms of the rule "excessive." Here, however, the Bankruptcy Court explicitly declined to pursue a determination that Petitioner's fees were excessive, disavowing any need to "ferret through the Defendant's testimony to determine whether fees are reasonable." (Pet. Apx. A35). Instead, the Bankruptcy Court attempted to take a shortcut through § 329 and Rule 2016, by sanctioning Petitioner for failing to disclose his fee arrangements and keep detailed time sheets. Had Petitioner been an officer of the bankruptcy court, by virtue of his participation as an attorney "*representing a debtor in a case under this title, or in connection with such case,*" 11 U.S.C. § 329(a), then Petitioner would have been subject to the "court's broad discretion in awarding and denying fees paid in connection with bankruptcy proceedings," *Matter of Prudhomme, supra,* and would have then been required to keep such detailed records. *See* Bankruptcy Rule 2016. Because Petitioner was only engaged in pre-petition transactions with the debtor, and did not participate in the bankruptcy proceedings, Petitioner was under no such obligation and was not subject to the bankruptcy court's inherent authority.

The bankruptcy court has other remedies in addition to those authorized by Rule 2017. Under Chapter Five (5) of Title Eleven (11), the trustee has the power to avoid many pre-petition transactions of the debtor,

including: any transactions made while the debtor was insolvent (§547(b)(3)); any transfer made within ninety (90) days prior to the filing of the petition (§547(b)(4)(A)); any transfer made between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider (§547(b)(4)(B)). These remedies have been applied to pre-petition transactions between a debtor and attorneys. *See, e.g., In re First Jersey Securities Inc.*, 180 F.3d 504 (3d Cir. 1999) (refusing to appoint counsel to represent debtor under § 327 because counsel had engaged in pre-petition stock transaction which would constitute a voidable transfer under § 547); *Seligson v. Roth,* 402 F.2d 883 (9th Cir. 1968) (voidable preference action brought to recover pre-petition attorney fee); *In re Pennsylvania Roofing & Sheet Metal, Inc.*, 9 B.R. 257 (Bkrpcy. W. D. Mich. 1981) (pre-petition payment to debtor's attorney was a voidable preferential transfer).

As the District Court recognized, the trustee had many options available with regard to seeking examination of the pre-petition payment for services to the Petitioner. "If [pre-petition payments to Petitioner] amounted to a preferential payment or a fraudulent transfer, the Trustee could have advanced such a claim. He did not make either such claim. Instead, the Trustee sought disgorgement based on [Petitioner's alleged] duty to report fees under § 329." *In re Triple S Restaurants, Inc.*, 306 B.R. 191, 196; Pet. Apx. A21. However, because Petitioner was not an attorney "*representing a debtor in a case under this title, or in connection with such case,*" 11 U.S.C. § 329(a), he had no duty to disclose pre-petition fee arrangements, and sanctions pursuant to §329 were not available.

II. THE JUDICIAL REWRITING OF THE BANKRUPTCY CODE BY THE COURT OF APPEALS, IN AN UNPUBLISHED OPINION, VIOLATED PETITIONER'S RIGHT TO DUE PROCESS.

The Fifth Amendment provides that "[no] person shall be . . . deprived of life, liberty, or property, without due process of law . . . ." It is axiomatic that the guarantee of due process precludes punishment without fair warning, *see Bouie v. City of Columbia,* 378 U.S. 347 (1964), as well as intentional and arbitrary discrimination in the application of the law. *Village of Willowbrook v. Olech,* 528 U.S. 562 (2000). In fashioning, in an unpublished opinion, an unprecedented and indefensible judicial revision of the Bankruptcy Code to uphold the Bankruptcy Court's imposition of punitive sanctions against Petitioner, the Court of Appeals ran afoul of both of these procedural safeguards.

A brief examination of *Plaut v. Spendthrift Farm,* 514 U.S. 211 (1995) is instructive. Prior to *Plaut,* this Court's holding in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson,* 501 U. S. 350 (1991), established a limitations period for actions brought under Sections 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 of the Securities and Exchange Commission. Congress responded almost immediately, enacting section 476 of the Federal Deposit Insurance Corporation Improvement Act of 1991, in which Congress sought to extend the limitations period for such actions, and to allow for the re-opening of any claims held time-barred under the *Lampf* decision. In *Plaut v. Spendthrift Farm, supra,* this Court struck down as unconstitutional Congress's attempt to overcome the *Lampf* decision.

In a concurring opinion, Justice Breyer addressed two evils of such legislation which rear their heads in the case

at bar. Congress's attempt to legislate with regard to particular cases, and specifically to "reopen, and to revise, final judgments in [those] individual cases," ran contrary to the proposition that the legislative branch ought to be empowered "to enact general laws." 514 U.S. at 241 (Breyer, J., concurring). To allow Congress to pass both "general laws" and laws aimed at achieving particular results in particular cases would be to allow the "accumulation of all powers, legislative, executive, and judiciary, in the same hands." *Id.* (quoting The Federalist No. 47, p. 241 (J. Gideon ed. 1831) (J. Madison); *id.,* No. 48, at 249 (quoting T. Jefferson, Notes on the State of Virginia)). One objective of the doctrine of separation of powers, noted Justice Breyer, is preventing "the same monarch or senate," having "enact[ed] tyrannical laws" from "execut[ing] them in a tyrannical manner." *Id.* (quoting 1 Montesquieu, The Spirit of Laws 174 (T. Nugent transl. 1886)). A separation of powers requiring the legislative branch of government to enact laws of general applicability "reflect[s], in part, the Framers' 'concern that a legislature should not be able unilaterally to impose a substantial deprivation on one person.'" *Id.*, 514 U.S. at 242 (quoting *INS v. Chadha,* 462 U. S. 919, 962 (1983) (Powell, J., concurring in judgment)).

> The Framers "expressed" this principle, both in "specific provisions, such as the Bill of Attainder Clause," and in the Constitution's "general allocation of power." *Ibid.; see United States v. Brown,* 381 U. S. 437, 442 (1965) (Bill of Attainder Clause intended to implement the separation of powers, acting as "a general safeguard against legislative exercise of the judicial function"); *Fletcher v. Peck,* 6 Cranch 87, 136 (1810) (Marshall, C. J.) ("It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the

duty of other departments"); *cf. Hurtado v. California,* 110 U. S. 516, 535-536 (1884).

Plaut, supra, 514 U.S. at 242 (Breyer, J., concurring); *see also id.* at 243 (citing *United States v. Brown, supra,* at 461) ("Congress must accomplish [its desired] results by rules of general applicability. It cannot specify the people upon whom the sanction it prescribes is to be levied").

Justice Breyer also took Congress to task for enacting legislation that was retroactive in nature, as the sole purpose of the legislation was to reopen judgments rendered closed by the *Lampf* decision. In contrast to unconstitutional retroactive legislation, "[s]tatutes that apply prospectively and (in part because of that prospectivity) to an open-ended class of persons," wrote Justice Breyer, "... are more than simply an effort to apply, person by person, a previously-enacted law, or to single out for oppressive treatment one, or a handful, of particular individuals." *Id.* at 243.

Justice Breyer concluded that the legislation at issue in *Plaut* violated the separation of powers doctrine because it "lack[ed] the liberty-protecting assurances that prospectivity and greater generality would have provided ...." *Id.* at 244.

In *Plaut,* this Court rejected Congress's bid to undo judicial action (the decision in *Lampf, supra*) with an enactment that was not sufficiently general or prospective in nature. Here, the Court of Appeals, by its expansive and unprecedented construction of 11 U.S.C. § 329 – in an unpublished decision – seeks to undo legislative action with a decision that is similarly not generally applicable or prospective in nature.

The same unfairness and potential for abuse, identified by Justice Breyer's concurrence in *Plaut,* are present here. By rewriting the Bankruptcy Code to

impose, *post hoc*, a duty on Petitioner which did not exist at the time he acted, the Court of Appeals undermined the purpose of the separation of powers. By legislating from the bench, the Court of Appeals appropriated to itself an "accumulation of all powers, legislative, executive, and judiciary, in the same hands." *Plaut*, 514 U.S. at 241 (Breyer, J., concurring) (citation omitted). The goal of preventing "the same monarch or senate," from both "enact[ing] tyrannical laws" and "execut[ing] them in a tyrannical manner," *id.* (quoting 1 Montesquieu, The Spirit of Laws 174 (T. Nugent transl. 1886)), is avoided when an appellate court is permitted to impose an unwarranted judicial expansion on existing legislation, and enforce it retroactively against an individual litigant in an unpublished decision lacking prospective applicability. The Court of Appeals "single[d] out for oppressive treatment one … particular individual[]." *Id.* at 243. That such a result was accomplished by judicial, rather than legislative action, is no reason to tolerate its inherent unfairness.

A. Petitioner was deprived of due process because he had no fair warning his conduct could merit sanctions.

"Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly." *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994).

In criminal matters, of course, the Ex Post Facto Clause prohibits the legislative branch of government from enacting laws which criminalize conduct already completed. U. S. Const., Art. I, §10; *Calder v. Bull*, 3 Dall. 386, 390 (1798) (Chase, J.). But this Court's decisions establish that the judicial branch of government

is similarly, if not identically, restricted by virtue of the Due Process Clause. Thus, "a deprivation of the right of fair warning can result … from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language." *Bouie v. City of Columbia,* 378 U.S. 347, 352 (1964). In *Rogers v. Tennessee,* 532 U.S. 451 (2001), this Court noted that because the Ex Post Facto Clause limits legislative action its principles cannot strictly be applied to judicial development of the common law, but held that "a judicial alteration of a common law doctrine of criminal law violates the principle of fair warning, and hence must not be given retroactive effect... [when] it is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue.'" *Id.* at 462 (quoting *Bouie, supra,* 378 U.S. at 354).

In civil matters, the Due Process Clause restricts the ability of the legislative branch to enact legislation with retroactive effect. This Court, in *Landgraf, supra,* held that an "antiretroactivity principle finds expression in several provisions of our Constitution." 511 U.S. at 266 (citing Article I, §§ 9, 10 (prohibition on Bills of Attainder, Contracts Clause, Ex Post Facto Clause); Amend. V (Takings Clause; Due Process Clause)). This Court determined that due process embodies the antiretroactivity principle. "[F]amiliar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance." *Landgraf, supra,* 511 U.S. at 270. The test of whether new legislation violates due process by violating the antiretroactivity principle is, ultimately, "whether the new provision attaches new legal consequences to events completed before its enactment." *Id.* at 270.

The statute at issue in *Landgraf* authorized compensatory and punitive damages not previously

available to sexual harrassment victims. Because Congress had not explicitly declared the statutory scheme to be retroactive, the Court was able to reconcile the statute with the antiretroactivity principle by presuming that Congress did not intend the statute to operate retroactively. 511 U.S. at 281-86. The Court was troubled especially by the prospect that the availability of punitive damages would contravene the antiretroactivity principle:

> The very labels given "punitive" or "exemplary" damages, as well as the rationales that support them, demonstrate that they share key characteristics of criminal sanctions. Retroactive imposition of punitive damages would raise a serious constitutional question. *See [Usery v.] Turner Elkhorn [Mining],* 428 U.S. [1], at 17 [(1976)] (Court would "hesitate to approve the retrospective imposition of liability on any theory of deterrence . . . or blameworthiness"); *De Veau v. Braisted,* 363 U.S. 144, 160 (1960) ("The mark of an ex post facto law is the imposition of what can fairly be designated punishment for past acts"). *See also Louis Vuitton S. A. v. Spencer Handbags Corp.,* 765 F.2d 966, 972 (CA2 1985) (retroactive application of punitive treble damages provisions of Trademark Counterfeiting Act of 1984 "would present a potential ex post facto problem").

Landgraf, 511 U.S. at 281; *see also Southwestern Tel. & Tel. Co. v. Danaher,* 238 U.S. 482, 490 (1915) (due process forbids imposing a civil penalty where "[t]here was no intentional wrongdoing, no departure from any prescribed or known standard of action, and no reckless conduct.").

The aforementioned decisions of this Court dictate the result here. Petitioner was subjected to a civil sanction by the Bankruptcy Court for his failure to file a disclosure statement pursuant to 11 U.S.C. § 329(a). As the District Court held, that section

> applies only to attorneys for the debtor and does not apply to counsel generally who provided services for a corporation prior to bankruptcy. The Court cannot find a single case in which a court applied the § 329 obligations to pre-petition counsel. *Now reading the provision, the words seem so clear that the Court is uncertain how one could state a view so confidently to the contrary.*

In re Triple S Restaurants, Inc., 306 B.R. 191, 195 (W.D. Ky. 2004) (Pet. Apx. A20) (emphasis added). Despite the clear language of § 329, the Sixth Circuit rendered an opinion which effectively excised the language of § 329 indicating what type of attorney is bound by the duty of disclosure announced therein, namely, an "attorney *representing a debtor in a case under this title, or in connection with such a case* …." *See* Section I, *supra.* In so doing, the Sixth Circuit announced "an unforeseeable and retroactive judicial expansion of narrow and precise statutory language." *Bouie supra,* 378 U.S. at 352. The Sixth Circuit's expansive reading of § 329 is "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue." *Rogers, supra,* 532 U.S. at 462 (citing *Bouie, supra*).

Further, the Bankruptcy Court's imposition of over $40,000 in civil *sanctions* is squarely foreclosed by this Court's decisions in *Landgraf* and *Southwestern Tel., supra.* The Bankruptcy Court sought to "deter noncompliance with the [Bankruptcy] Code and Rules" and "sanction [Petitioner] for his failure to comply with the full disclosure requirements …." (Pet. Apx. A34). By

affirming the Bankruptcy Court's imposition of quasi-criminal penalties against Petitioner, who had no fair warning that he was even required to submit a § 329 disclosure, the Sixth Circuit "attaches new legal consequences to events completed" before its "judicial expansion" of § 329. *Landgraf, supra.* Such a result is completely inconsistent with due process.

B. Petitioner was deprived of due process when the Court of Appeals violated the principle of equal protection by rewriting the Bankruptcy Code in Petitioner's case in an unpublished decision.

Like the legislation in *Plaut, supra,* the unpublished decision of the Court of Appeals here lacks those "liberty-protecting assurances that prospectivity and greater generality would have provided," *id.,* 514 U.S. at 244 (Breyer, J., concurring). That the judicial rewrite of the Bankruptcy Code targeted Petitioner in an unpublished decision implicates due process concerns because the decision of the Court of Appeals lacks prospectivity and generality.

The Due Process Clause of the Fifth Amendment forbids the Federal Government to deny equal protection of the laws. *Vance v. Bradley,* 440 U.S. 93, 95 n. 1 (1979) (citing *Hampton v. Mow Sun Wong,* 426 U.S. 88, 100 (1976); *Buckley v. Valeo,* 424 U.S. 1, 93 (1976); *Weinberger v. Wiesenfeld,* 420 U.S. 636, 638 n. 2 (1975); *Bolling v. Sharpe,* 347 U.S. 497, 500 (1954)). And equal protection "secure[s] every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." *Sioux City Bridge Co.,* 260 U.S. 441, 445 (1923) (quoting *Sunday Lake Iron Co. v. Township of Wakefield,* 247 U. S. 350, 352 (1918)). Equal protection

is violated even where a "class of one" is treated differently and there is no rational basis for the difference in treatment. *Village of Willowbrook v. Olech,* 528 U.S. 562 (2000).

Here, the Court of Appeals' decision, because it is a decision not designated for publication, lacks prospectivity and generality. Indeed the failure of the Court of Appeals to publish this decision emphasizes that this decision is, in effect, a judicial bill of attainder targeting Petition for singular treatment.

The rules of the Sixth Circuit would appear to favor publication of this opinion. Several of the factors listed in Sixth Circuit Rule 206(a) as criteria which "shall be considered by panels in determining whether a decision will be designated for publication in the Federal Reporter" weigh in favor of publication. As is noted above, *see* Sections I, II-A, *supra,* the decision establishes a new rule of law – indeed, a rule of law wholly "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue." *Rogers v. Tennessee, supra,* 532 U.S. at 462 (citation and quotations omitted). 6^{th} Cir. R. 206(a)(1). To the extent that the rule of law announced in the Court of Appeals' decision imposes a duty of disclosure on all counsel who transact business with a person or entity later made a "debtor" in bankruptcy, the decision would appear to "discuss[] a legal or factual issue of continuing public interest," weighing in favor of publication. 6^{th} Cir. R. 206(a)(3). The Court of Appeals reversed the court below, and the reversal was not due to intervening changes in the law or due to a remand or reversal of this Court. 6^{th} Cir. R. 206(a)(5). The district court's opinion was published, *In re Triple S Restaurants, Inc.,* 306 B.R. 191 (W.D. Ky. 2004), which weighs in favor of publication by the Court of Appeals. 6^{th} Cir. R. 206(a)(6).

Despite the many factors weighing in favor of publication, the Sixth Circuit nonetheless decided against publication. The effect of this decision is to create a private rule of law which applies only to Petitioner. Had the Sixth Circuit published its decision, the decision would have become binding precedent. 6th Cir. R. 206(c) ("Reported panel opinions are binding on subsequent panels. Thus, no subsequent panel overrules a published opinion of a previous panel."). Only *en banc* action by the Sixth Circuit, or a contrary decision by this Court, could then prevent the decision's prospective general application to future litigants. *Id.*

By contrast, an unpublished decision of a panel of the Sixth Circuit "is without precedential value." *Kidd v. Commissioner of Social Security Administration,* No. 99-6481, 7 Fed. Appx. 483, 489 (6th Cir. 2001)(citing 6th Cir. R. 28(g)). At least, such was the opinion of a panel of Sixth Circuit judges, expressed in an unpublished decision. *Id.; compare Baer v. R&F Coal Co.,* 782 F.2d 600, 602 (6th Cir. 1986) (noting that Sixth Circuit Rule 24, the predecessor to Rule 28(g), permits citation to unpublished decisions, though practice is "disfavored").

In *Anastasoff v. United States,* 223 F.3d 898 (8th Cir. 2000), *vacated on other grounds,* 235 F.3d 1054, 1056 (8th Cir. 2000) (en banc), a panel of the Eighth Circuit Court of Appeals concluded that its rule forbidding use of unpublished opinions as precedent violated Article III of the United States Constitution. The *Anastasoff* panel began by noting that the eighteenth-century view of judging was that judges would examine precedent to "determine" and "declare" what the law is. *Anastasoff,* 223 F.3d at 901(citing 3 Blackstone, Commentaries *25, *69). Under this view, judges are "not delegated to pronounce a new law, but to maintain and expound the old." *Id.* (citing 3 Blackstone, Commentaries *69). "The

judicial power to determine law is a power only to determine what the law is, not to invent it." *Id.*; *see also id.* (citing 1 Coke, Institutes 51 (1642)) ("[i]t is the function of a judge not to make, but to declare the law, according to the golden mete-wand of the law and not by the crooked cord of discretion.") On this view, the use of precedent to "determine" the law is undermined by rules "disfavoring" citation to unpublished decisions. Furthermore, such rules violate the doctrine of separation of powers by abolishing the predictive quality of precedent: "In addition to keeping the law stable, this doctrine is also essential, according to Blackstone, for the separation of legislative and judicial power. ... If judges had the legislative power to "depart from" established legal principles, "the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinions . . .." *Anastasoff,* 223 F.3d at 901. (quoting 1 Blackstone, Commentaries, at *259).

Allowing courts the ability to avoid the precedential value of their decisions means that courts can arrogate legislative power to decide each particular case as they choose, without binding future litigants.

> Like Blackstone, [Hamilton] recognized that this limit on judicial decision-making is a crucial sign of the separation of the legislative and judicial power. [The Federalist No. 78] at 508. Hamilton concludes that "[t]o avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them . . .." *Id.* at 510.

Anastasoff, 223 F.3d at 902; *id.* at n.12 (quoting William Cranch, Preface, 1 Cranch iii (1804) ("In a government which is emphatically styled a government of laws, the least possible range ought to be left for the discretion of

the judge . . . perhaps nothing conduces more to that object than the publication of reports. Every case decided is a check upon the judge. He can not decide a similar case differently, without strong reasons, which, for his own justification, he will wish to make public.").

The *Anastasoff* court correctly concluded that the ability to disregard prior judicial decisions was destructive of the separation of powers, and would forecast "a dangerous union with the legislative power." 223 F.3d at 903. Adherence to precedent means that decisions of courts are "founded in permanent principles, and not dependent upon the caprice or will of judges," and a departure from this practice, through rules disfavoring the use of prior judicial decisions as precedent, "would have been justly deemed an approach to tyranny and arbitrary power, to the exercise of mere discretion, and to the abandonment of all the just checks upon judicial authority." *Id.* at 904 (quoting Joseph Story, Commentaries on the Constitution of the United States §§ 377-78 (1833)).

Here, the Court of Appeals violated the principle of "fair warning" by rewriting 11 U.S.C. § 329 in a manner "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue." That the Court of Appeals did so in a decision designated not to be published, a decision "without precedential value," *Kidd, supra,* to which citation by future litigants would be "disfavored," 6^{th} Cir. Rule 28(g), indicates that the Court of Appeals sought to treat Petitioner as a "class of one." *Village of Willowbrook v. Olech,* 528 U.S. 562 (2000). The Sixth Circuit panel which decided Petitioner's case, by declaring its decision not for publication, allows the next Sixth Circuit panel to consider this legal question to disregard its decision and reach the opposite result. 6^{th} Cir. R. 206(c).

Because the Sixth Circuit decision imposes a new rule of law upon Petitioner retroactively, "attach[ing] new legal consequences" – here, civil sanctions amounting to over $40,000 in fines – "to events completed" before the decision, *Landgraf, supra,* and because this decision is targeted at Petitioner and by virtue of its designation as unpublished "lacks the liberty-protecting assurances that prospectivity and greater generality would have provided," *Plaut, supra,* 514 U.S. at 244 (Breyer, J., concurring), this Court must conclude that the decision of the Court of Appeals violated Petitioner's right to due process under the Fifth Amendment to the United States Constitution.

CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that this Court will grant this Petition for a writ of certiorari to the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

Christopher N. Lasch
GOODWIN & LASCH, PSC
6008 Brownsboro Park Blvd.
Louisville, Kentucky 40207
(502) 584-7622

Counsel for Petitioner

APPENDIX

NOT RECOMMENDED FOR
FULL-TEXT PUBLICATION
Filed: May 10, 2005
No. 04-5330
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In Re:	)	
TRIPLE S RESTAURANTS, INC.,	)	
Debtor.	)	
J. BAXTER SCHILLING, Trustee,	)	
Plaintiff-Appellant,	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY
v.	)	
DONALD M. HEAVRIN,	)	
Defendant-Appellee.	)	

Before: DAUGHTREY and CLAY, Circuit Judges, and GRAHAM,* District Judge.

PER CURIAM. In this Chapter 7 bankruptcy case, a parallel proceeding to *Schilling v. Harrod Trust*, No. 04-5194, the bankruptcy trustee appeals the district court's reversal of the bankruptcy court's order to disgorge part of the fees collected by Donald

* The Hon. James L. Graham, United States District Judge for the Southern District of Ohio, sitting by designation.

Heavrin, general counsel for the debtor. Pursuant to a retainer agreement, Triple S paid Heavrin $10,000 per month to make his legal services available. During the year preceding Triple S's Chapter 11 petition, most of Heavrin's legal work involved renegotiating finance agreements and defending law suits in an effort to bolster the financial stability of the corporation. After Triple S filed for bankruptcy protection, Heavrin did not submit a statement of fees paid to him or an accounting of the time he worked for the debtor, as required by the Federal Bankruptcy Rules. Instead, a statement reflecting the payments to Heavrin was submitted by the corporation's bankruptcy attorney as part of an accounting of payments to insiders. The trustee then initiated this adversary proceeding to recover all fees paid to Heavrin by Triple S. The bankruptcy court twice ordered all of the legal fees disgorged, and the district court affirmed the order both times, subject to specific evidentiary findings. After an evidentiary hearing, the bankruptcy court entered a third judgment, but this one substantially reduced the amount of the recovery to the trustee. This order was reversed by the district court, based on its reversal of its own prior determination that the services rendered by Heavrin were performed in connection with the bankruptcy petition. The bankruptcy trustee now appeals the district court's order. Because we conclude that the bankruptcy court's final determination did not involve an abuse of discretion, we vacate the district court's judgment and reinstate that of the bankruptcy judge.

FACTUAL AND PROCEDURAL BACKGROUND

At the time that the bankruptcy proceedings in this

case began, defendant Donald Heavrin was acting as general counsel for the debtor, Triple S Restaurants, a closely-held corporation in which his step-father, Robert Harrod, was a 50 percent shareholder. In 1987, Heavrin had filed the incorporation papers for Triple S and, initially, he billed his legalwork for Triple S at the rate of $125 per hour, a $25 discount from his standard rate. From 1988 through August of 1992, the defendant sent monthly bills to Triple S. Other than the period of incorporation, the invoices were never for more than $2,000.00. With each invoice, Heavrin submitted a statement of the nature of the work he had performed and the time spent on it. However, he did not retain the time sheets that he used to prepare these statements.

In August 1992, Harrod and the other Triple S shareholder, Michael MacAtee, met with Heavrin and told him that Triple S was in dire financial straits. They believed that it was necessary for the corporation to file for Chapter 11 protection that same day. The defendant made a cursory review of Triple S's recent financial statements and determined that "they were in a cash flow crunch." He dissuaded Harrod and MacAtee from filing a bankruptcy petition immediately and, instead, undertook to renegotiate the terms of the corporation's debt service and reduce the monthly payments. According to the defendant, between August and December 1992, he negotiated arrangements with Triple S's creditors that apparently enabled the corporation again to experience a positive cash flow.

Heavrin billed the corporation approximately $30,000 for the time spent conducting these negotiations with creditors. Harrod told him that Triple S was not in a

financial position to pay that amount and proposed instead that Triple S enter into a retainer agreement with Heavrin, paying him $10,000 per month for 36 months to be available to the corporation for legal representation in those jurisdictions where Heavrin was admitted (Kentucky and Indiana). In this way, Harrod proposed, Heavrin would recoup the outstanding $30,000 within three months and then would have a "heck of a deal."

Heavrin agreed and drafted the retainer agreement, which did not obligate Heavrin to do anything specific but merely recited the term of the agreement and the amount of the monthly payment. MacAtee, Harrod, and Heavrin signed the agreement on December 4, 1992, and the payments began in January 1993. Throughout the next 20 months, Heavrin engaged in litigation on behalf of Triple S. Most of these cases were initiated by creditors seeking payment. For example, Bell Atlantic, AEI Fund Management, Inc., Sizzler Restaurant International, Inc., Sysco, and McDonnell Douglas Finance Corporation all discussed and prepared or filed legal action against Triple S for unpaid debts.

Ultimately, any benefits from Heavrin's negotiations with Triple S's creditors did not last, and the corporation was forced to file a Chapter 11 reorganization petition on September 30, 1994. The case was converted by order to a Chapter 7 liquidation proceeding on December 13, 1994. The bankruptcy attorney for Triple S submitted a schedule of "Payments to Insiders" showing that in the year preceding the filing of the Chapter 11 petition, Triple S had paid Heavrin $153,177.71.

In 1996, the bankruptcy trustee initiated an adversary proceeding seeking to force Heavrin to disgorge all fees paid by Triple S pursuant to the retainer agreement. On March 11, 1998, Judge Roberts of the bankruptcy court determined that the services that Heavrin had provided to Triple S were covered by Section 329 of the Bankruptcy Code and,therefore, that Heavrin was obligated to file a statement pursuant to Bankruptcy Rule 2016. Because he had not filed an accounting, the judge ordered him to pay $153, 477.71, the amount he received in the year preceding the filing of the bankruptcy petition, to the estate. Heavrin appealed the judgment, and the district court found that the fees had been paid "in contemplation of" the filing of the bankruptcy petition. However, the district court judge ruled that our opinion in *In re Downs*, 103 F.3d 472 (6th Cir. 1996), did not automatically require the disgorgement of all fees paid in the year prior to the filing of the Chapter 11 petition for failure to submit a Section 329 statement. Instead, the court held that *Downs* required complete disgorgement only in cases of "callous disregard" of fiduciary duties, and it therefore remanded the case to the bankruptcy court for factual findings on whether Heavrin's conduct met this standard.

On remand, the bankruptcy court reviewed the evidence in the record and found that Heavrin had, in fact, shown a callous disregard for his fiduciary duties. The judge noted, for example, that "Heavrin . . . attempted to paint himself as an attorney without any comprehension of the Bankruptcy Code, even though he has practiced [in bankruptcy court] on several occasions." The judge also found that in addition to Heavrin's failure to file a statement of the

fees he himself received from Triple S, he had failed to submit statements of several fee-sharing arrangements in which he participated in rendering legal service to Triple S, also a violation of Rule 2016. Further, although Heavrin produced checks paid to other attorneys as evidence that he did not retain all of the moneys Triple S paid to him, these checks did not reference Triple S or give any indication what legal work was performed in exchange for payment. Based on these findings, the judge again ordered complete disgorgement of the fees paid to Heavrin in the pre-petition year.

On appeal, the district court remanded the case a second time, again for additional fact finding. Specifically, the court stated that it was "concerned that the Bankruptcy Court would reach conclusions as to Heavrin's intentions and motives without holding an evidentiary hearing." The court articulated the question on remand as "not whether the amounts paid to Heavrin were proper . . . [but] whether the payments (whether excessive or not) were properly disclosed and, if not, whether the failure to do so amounted to a 'callous disregard.'"

During the pendency of the second appeal, the original bankruptcy judge recused himself from the case, and on remand it was assigned to another judge, who conducted an evidentiary hearing and heard testimony from witnesses including Heavrin, his wife, Innes Mather (Triple S's accountant), and David Chinn (Triple S's bankruptcy counsel). Like the original bankruptcy judge and the district judge, the newly assigned bankruptcy judge found that the services Heavrin rendered were in contemplation of the filing of the bankruptcy petition and, therefore,

that he was obligated to submit a Section 329 statement. However, based on Chinn's testimony that he himself had filed a Section 329 statement and had not advised Heavrin to do so because he believed that the fees were more appropriately disclosed on a statement of payments to insiders, the bankruptcy court was unable to find that Heavrin had engaged in a callous disregard of his fiduciary duties. The court went on to rule that:

> [T]he purpose of the disclosure requirements [] is to protect both creditors and the debtor from overreaching by attorneys. Based on the facts and circumstances of this case, the Court must sanction the Defendant to deter noncompliance with the Code and Rules by attorneys and to further the objectives of these statutory provisions. The Court, in exercising its discretion, must likewise sanction Defendant for his failure to comply with the full disclosure requirements, including his failure to maintain records of the time spent on matters pertaining to the debtor.
>
> In this case, Defendant has steadfastly refused to amend or supplement the record with his fee arrangement with the Debtor, even after the United States District Court concluded that Defendant was required to file a fee disclosure statement. . . . Despite Defendant's puzzling failure to disclose the fees received or adequately document his time, the Court acknowledges that the Defendant provided substantial services during the year preceding the bankruptcy and recognizes his efforts merit compensation.

Based on these findings, the judge ordered the defendant to disgorge $46,043.32 in fees.

On appeal, the district court – after having twice affirmed the bankruptcy court's findings regarding the nature of Heavrin's services in relation to the bankruptcy petition and the corollary obligation to file a Section 329 statement – reversed the new order and its own prior rulings. The court found that "numerous mistakes and misconceptions seem to have invested the arguments on [whether the payment should be disgorged]." The court went on to rule that "Section 329 applies only to attorneys for the debtor and does not apply to counsel generally who provided services for a corporation prior to bankruptcy . . . . [T]he words seem so clear that the Court is uncertain how one could state a view so confidently to the contrary." Finally, the district judge backed away from his earlier agreement with the bankruptcy court ruling by stating that he did not "intend to determine that Heavrin's services for the year preceding the bankruptcy were 'in connection with the bankruptcy.'" The trustee now appeals the district court's ruling.

DISCUSSION

In this appeal, we are required to make two straight-forward inquiries. The first is factual and pertains to the work that Heavrin performed for Triple S under the retainer agreement in the year leading up to the corporation's filing its Chapter 11 petition. The second is whether the bankruptcy court abused its discretion in its order for partial disgorgement of fees.

Section 329(a) of the Bankruptcy code provides:

> Any attorney representing a debtor in a case under this title, or in connection with such a case, whether or not such attorney applies for compensation under this title, shall file with the court a statement of the compensation paid or agreed to be paid, if such payment or agreement was made after one year before the date of the filing of the petition, *for services* rendered or to be rendered *in contemplation of* or in connection with *the case* by such attorney, and the source of such contemplation.

(Emphasis added.) Bankruptcy Rule 2016(b) parallels Section 329, requiring that "[e]very attorney for a debtor . . . shall file with the court . . . the statement required by § 329 of the Code which shall also set forth whether the attorney has shared or agreed to share the compensation with any other person."

Although the cases interpreting the term "in contemplation of" are relatively few in number, the law is well-settled, dating back to *Tripp v. Mitschrich*, 211 F. 424 (8th Cir. 1914). There, the Eighth Circuit considered a claim by a bankruptcy trustee to recover fees paid by the debtor to an attorney retained pre-petition on a contingency basis to pursue a settlement with insurance companies. Five days after the contract, creditors filed a bankruptcy petition against the debtor. During the bankruptcy proceeding, the attorney settled the case with the insurers and delivered the settlement amount to the debtor, keeping his agreed 30-percent contingency fee. The trustee sought to recover this sum. The court examined Section 60d of the Bankruptcy Act, the

predecessor to Section 329, and determined that:

> The words 'in contemplation of bankruptcy' refer to the state of mind of the debtor, not of the attorney. . . Contemplation thus means more than the knowledge that a bankruptcy proceeding . . . is impending. It means that in making the transfer the debtor is influenced by the possibility or imminence of such a proceeding. There must be some relation as of cause and effect between knowledge of his condition and the transfer. . . . In a case under section 60d the debtor must of course be confronted with the possibility of a bankruptcy proceeding. But there must be more. There must be a transfer induced at least to some extent by such a situation.

Mitschrich, 211 F. at 426. The court determined that the debtor's agreement with the attorney was induced by his need for assistance in obtaining the benefit under his property insurance contract, not "in contemplation of" the impending bankruptcy.

Some 20 years later, the Supreme Court considered the same phrase in *Conrad, Rubin & Lesser v. Pender*, 289 U.S. 472 (1933). There, attorneys challenged a bankruptcy court's jurisdiction to review under Section 60d a payment to the debtor made to them 12 days before filing a bankruptcy petition. The debtor had made the payment to retain the attorneys to assist another lawyer, who had already been hired, in negotiating a settlement with creditors. The Court held that "the controlling question is with respect to the state of mind of the debtor and whether the thought of bankruptcy was the impelling cause of the transaction." 289 U.S. at 477. The Court noted that

"negotiations to prevent bankruptcy may demonstrate that the thought of bankruptcy was the impelling cause of payment. A man is usually very much in contemplation of a result which he employs counsel to avoid." 289 U.S. at 479 (internal quotes omitted).

In this appeal, the legal services at issue were rendered under a retainer agreement, the terms of which required that Triple S would pay Heavrin $10,000 each month for his unlimited availability. In the year leading up to the filing of the Triple S bankruptcy petition, a substantial portion of the legal service Heavrin rendered to Triple S was defending the encroaching claims of creditors to "keep [the company] out of Chapter 11." Triple S, as debtor and client, was very much in contemplation of the result that it directed counsel to avoid. Thus, the fees paid were for services rendered in contemplation of a bankruptcy case.

Once it is established that the fees Triple S paid to Heavrin were for services in contemplation of the filing of a bankruptcy petition, it follows that Heavrin had a fiduciary duty to file a Section 329 statement. *See Downs*, 103 F.3d at 477 ("Under this provision . . . an attorney must disclose any fee arrangements made within . . . a year of filing the petition."). The next question, then, is whether the order of the bankruptcy court was appropriate. More precisely, we must determine whether the bankruptcy judge abused his discretion by ordering a partial disgorgement of the fees. We "will find an abuse of discretion only upon 'a definite and firm conviction that the [lower] court committed a clear error in judgment.'" *In re Kisseberth*, 273 F.3d 714, 721 (6th Cir. 2001) (quoting *Logan v. Dayton Hudson Corp.*,

865 F.2d 789, 790 (6th Cir. 1989)). We find no such error here.

"Bankruptcy courts have broad and inherent authority to deny any and all compensation where an attorney fails to satisfy the requirements of the Code and the Rules . . . . Disgorgement may be proper even though the failure to disclose resulted . . . from negligence or inadvertence." 273 F.3d at 721. The original bankruptcy judge assigned to this case twice found, and the district judge twice agreed, that Heavrin rendered services in contemplation of the petition and failed to file a Section 329 statement. The bankruptcy judge further found several more instances where Heavrin failed to fulfill his fiduciary duty by not complying with the Code's requirement to report fee sharing arrangements or offering detailed reports of his time spent representing Triple S in the year pre-petition. Nevertheless, the bankruptcy judge later assigned to the case reduced the amount that Heavrin was ordered to disgorge by more than two-thirds, out of recognition that "his efforts merit compensation," a determination that enabled Heavrin to keep almost all of the fees paid to him under the retainer agreement in the pre-petition year. The bankruptcy judge required partial disgorgement, however, in order to uphold the provisions of the Bankruptcy Code and encourage compliance with its requirements. Although we conclude that the final order was, if anything, unduly generous to Heavrin, we cannot say that it constituted an abuse of discretion.

CONCLUSION

Because Triple S paid fees to Heavrin for services in

contemplation of bankruptcy, which Heavrin was required to report to the bankruptcy court under Section 329 but did not, and because there was no clear error in connection with the bankruptcy court's order for partial disgorgement, we VACATE the judgment of the district court and REINSTATE that of the bankruptcy court.

UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF KENTUCKY

IN RE: TRIPLE S RESTAURANTS, INC.

* * * * *

DONALD M. HEAVRIN PLAINTIFF

V. CIVIL ACTION NO. 3:03CV-217-H
Adv. Act. No. 96-3128

J. BAXTER SCHILLING DEFENDANT

* * * * *

J. BAXTER SCHILLING PLAINTIFF

V. CIVIL ACTION NO. 3:03CV-396-H
Adv. Act. No. 96-3129

ROBERT E. HARROD DEFENDANT

* * * * *

J. BAXTER SCHILLING PLAINTIFF

V. CIVIL ACTION NO. 3:03CV-546-H
Adv. Act. No. 96-3129

ROBERT E. HARROD, et al. DEFENDANTS

MEMORANDUM OPINION

This Memorandum Opinion concerns three separate appeals arising out of Triple S Restaurants, Inc. ("TSR") bankruptcy. Each of these appeals is related. Some of the issues raised in each are the same, others are distinct. In addition, the Court is considering another related case on remand from the Sixth Circuit, *United States of America v. Donald M. Heavrin*, Criminal Action No. 3:99CR-113-H. Contemporaneously, the Court is issuing an opinion in that case and makes reference to it here.

In these appeals the Court will consider the following issues in turn: (1) whether the Bankruptcy Court erred by determining that the payment of $252,000 of insurance proceeds from Jackson National Insurance Company ("Jackson National") to the Harrod Irrevocable Trust (the "Trust") was void; (2) whether the Bankruptcy Court erred by requiring Donald Heavrin ("Heavrin") and Bobbie Bridges ("Bridges") to reimburse the TSR bankruptcy estate for the full amount of the insurance proceeds which they received; (3) whether the Bankruptcy Court erred by requiring Heavrin to disgorge attorney's fees that TSR paid to him within one year of its bankruptcy; and (4) whether Judge David Stosberg erred by not recusing himself from these cases.

The general circumstances of these cases are well known to everyone. The Court will proceed with its analysis drawing on such parts of the evidence as is necessary.

I.

The first two issues are related and concern whether

the Bankruptcy Court erred in ordering Heavrin and Bridges to reimburse the TSR estate for $252,000 which they received from the Harrod Trust. The Bankruptcy Court found that Heavrin's conduct amounted to actual fraud. This Court disagrees. For reasons quite different than those set out by the Bankruptcy Court, however, this Court concludes that its result is correct.

Section 548 of the Bankruptcy Code, 11 U.S.C. § 548, empowers a trustee in bankruptcy to avoid fraudulent transfers. The trustee may set aside transfers infected by actual fraud. Certain other transactions categorized as constructively fraudulent transfers are also subject to those same powers. The constructive fraud provision permits avoidance where the trustee can establish (1) that the debtor had an interest in property; (2) that a transfer of that interest occurred within one year of the filing of the bankruptcy petition; (3) that the debtor was insolvent at the time of the transfer or became insolvent as a result thereof; and (4) that the debtor received "less than a reasonable equivalent value in exchange for such transfer." 11 U.S.C. § 548(a)(2)(A); *BFP v. Resolution Trust Corporation,* 511 U.S. 531, 535 (1994). In our circumstances, the Trustee meets all of these requirements.

A.

One could make reasonable arguments about whether a fully assigned insurance policy remains property of a bankrupt estate. This is the critical issue concerning the avoidance of the transaction. Prior to June 17, 1994, TSR had an interest in the Jackson National policy (the "Policy"), even though it had executed a

collateral assignment of the Policy to McDonald Douglas Finance Corporation ("MDFC"). Foremost, it was the legal owner of the Policy. TSR retained the right to any proceeds remaining after satisfaction of the MDFC debt. Its ownership had little actual value other than that the Policy would ultimately reduce TSR's debt to MDFC. Its interest as owner may have been a legal formality, but an interest nonetheless. Its interest in the Policy proceeds to offset the debt of MDFC was quite real and apparent. Its reverter interest, in the circumstance that the Policy proceeds exceeded TSR's indebtedness to MDFC, appeared to have almost no actual value as to the circumstances in June, 1994. Though its value may have been questionable, the interest as a matter of law cannot be ignored. Under 11 U.S.C. § 541(a)(5)(C), the Court finds that the Harrod Policy did constitute an interest in property of TSR as of June 17, 1994. TSR did retain an interest in the Harrod Policy.

TSR did transfer the Policy to the Harrod Trust within a year TSR filed its bankruptcy petition. The term "insolvent" is defined at 11 U.S.C. § 101(26) to mean, generally stated, that the sum of one's debts is greater than the value of his property in a fair evaluation. Even though actual bankruptcy filing was still several months away, no one would seem to dispute that even in June TSR's debts greatly exceeded its assets. TSR appears to have been insolvent at the time of the transfer. Thus, the second element is established.

The last remaining question is whether the debtor received a reasonable equivalent value in exchange for the transfer. This question is made somewhat easier due to the fact that TSR received no consideration for the transfer of the Policy. Previously

this Court has said that the reverter interest had almost no value. In June, 1994, this certainly seemed the case. The Court should look at all the circumstances when determining whether TSR received reasonable value in exchange for such a transfer. Two events unrelated to TSR's transfer convince the Court that the absence of any consideration cannot be deemed reasonable or equitable under the whole circumstances.

As a result of the transfer, TSR lost something--MDFC eventually claimed only $1,750,000 rather than $2,000,000 as a setoff on its secured debt; and Heavrin gained something--the apparent opportunity and leverage to negotiate a $252,000 settlement with MDFC. Under those circumstances, the transfer created value for Heavrin and caused a determent to TSR. In return, for providing this value and undertaking a determent, TSR received no consideration. The Court concludes that the Trustee has satisfied all the requirements of constructive fraud under Section 548(a)(2)(A).

B.

The Bankruptcy Code empowers the Court to employ equitable remedies to recover the value of property avoided under Section 548 from any person who is the immediate or mediate transferee of the original transferee. 11 U.S.C. § 550(a). Heavrin and Bridges fit precisely that definition as each was the immediate transferee from the Harrod Trust.

The evidence is completely confusing as to why MDFC would settle with Heavrin and agree to Jackson National paying $252,000 from the proceeds

of the policy directly to the Harrod Trust. What cannot be seriously disputed is that the Harrod Trust did obtain those proceeds directly from Jackson National which otherwise would have reduced MDFC's unsecured claim against the TSR estate. Neither the Harrod Trust nor Heavrin can be faulted for MDFC limiting its setoff to $1,750,000 rather than $2,000,000. As a matter of equity, however, it cannot be disputed that the Harrod Trust benefitted and the creditors of TSR were harmed by this result. Consequently, both as a matter of law and equity, the Court concludes that it is proper to require repayment of the Policy proceeds from Heavrin and Bridges to the TSR estate.[1]

II.

The Court must next determine whether the Bankruptcy Court erred in determining that Heavrin must disgorge approximately $46,000 in attorney's fees which he received from TSR within one year of the bankruptcy petition. This issue has been the subject of some difference of opinion between the bankruptcy and district courts. The Bankruptcy Court believes that because TSR reported the fees as insider payments and because Heavrin did not independently report the fees, these payments within the year prior to the bankruptcy should be disgorged. After reviewing this matter in its entirety, the Court

[1] The Court disagrees with the Bankruptcy Court's finding of actual fraud. *See U.S. v. Heavrin,* 144 F.Supp.2d 769 (W.D.Ky. 2001). The evidence before the Bankruptcy Court appears similar to that which this Court considered in the criminal trial. The standard of proof, of course, is much different. Moreover, the elements necessary are different. The Court need not review the Bankruptcy Court's determination of actual fraud.

concludes that it is best to start its analysis from scratch. This is necessary because numerous mistakes and misconceptions seem to have invested the arguments on this issue. The Court does not excuse itself from this indictment. The basic and original assertion here is that Heavrin must be required to disgorge all his fees because he did not disclose those fees as required by 11 U.S.C. § 329. The Court now believes that the entire premise of this assertion is incorrect.

Section 329 requires "any attorney representing a debtor in a case under this title, or in connection with such a case" must file a statement of compensation received from the debtor within the year preceding filing of the petition. Heavrin was counsel for TSR prior to bankruptcy. He was not counsel for the debtor TSR. As yet the Court has not seen evidence that Heavrin represented the debtor while in bankruptcy. By its terms § 329 applies only to attorneys for the debtor and does not apply to counsel generally who provided services for a corporation prior to bankruptcy. The Court cannot find a single case in which a court applied the § 329 obligations to pre-petition counsel. Now reading the provision, the words seem so clear that the Court is uncertain how one could state a view so confidently to the contrary.

It does not seem to this Court that Heavrin should be sanctioned for Mr. Chinn's failure to disclose fees which TSR paid to Heavrin. The duty to disclose such fees and other disbursements bound Chinn, TSR and perhaps corporate officers, not Heavrin. Moreover, the payments were not concealed. Chinn disclosed the fees in the petition as payment to a related person.

The Court has previously conducted a perhaps overly thorough analysis of *In re Downs*, 103 F.3d 472 (1996). In that case, Mr. Friedman replaced the original counsel for the debtor, Downs. Friedman represented Downs in the on-going bankruptcy proceedings. Thus, § 329 clearly applied to him. This Court's analysis of *Downs* appears correct except for the assumption that the § 329 disclosure requirements bound Heavrin. Not being an attorney for the debtor, Heavrin is in a different position than Friedman. To that extent this Court has been in error.

A few other comments are in order. This Court did not intend to determine that Heavrin's services for the year preceding the bankruptcy were "in connection with the bankruptcy." Heavrin performed substantial services for TSR prior to its petition. That Heavrin was probably aware that TSR was in danger of a bankruptcy is quite irrelevant to the Court's analysis.

The thrust of the Trustee's argument seems to be that Heavrin was paid more than he deserved to receive. No one seems to disagree that Heavrin engaged in an arrangement for a $10,000 monthly retainer from TSR and that he performed a substantial amount of work. If this amounted to a preferential payment or a fraudulent transfer, the Trustee could have advanced such a claim. He did not make either such claim. Instead, the Trustee sought disgorgement based on Heavrin's failure to comply with his duty to report fees under § 329. Absent a duty that the statute would impose if Heavrin was an attorney for the debtor, the Trustee cannot maintain a claim of disgorgement under § 329.

III.

Finally, the Court must determine whether the Bankruptcy Court erred in denying Heavrin's motion that Judge Stosberg be recused from this case. Heavrin argues that Judge Stosberg should have recused himself, mostly on the grounds of comments and rulings which the judge made during the course of the litigation. The Court disagrees.

This litigation has been hotly contested. In the course of it, Judge Stosberg has made numerous decisions which required that he assess Mr. Heavrin's truthfulness and motivation. That he made those decisions adversely to Heavrin, does not require Judge Stosberg to recuse himself. The Court agrees with Judge Stosberg's handling of the recusal motion and concludes that his denial of that motion is supported by the law and sufficient facts of record. The Court finds no basis for concluding that Judge Stosberg erred or abused his discretion in denying the motion.

The Court will enter an order consistent with this Memorandum Opinion.

ORDER

The Court has considered numerous issues on appeal in these three cases. The Court has issued a Memorandum Opinion discussing those issues. Being otherwise sufficiently advised,

IT IS HEREBY ORDERED that the Bankruptcy Court's order determining that the payment of $252,000 of insurance proceeds from Jackson National Insurance Company to the Harrod Irrevocable Trust to be void is AFFIRMED.

IT IS FURTHER ORDERED that the Bankruptcy Court's order requiring Donald Heavrin and Bobbie Bridges to reimburse the TSR Trustee in the amount of $252,000 for the proceeds of insurance policy received is AFFIRMED.

IT IS FURTHER ORDERED that the Bankruptcy Court's order requiring Donald Heavrin to disgorge attorney's fees in the amount of $46,000 received from TSR is REVERSED.

IT IS FURTHER ORDERED that the Bankruptcy Court's order denying Donald Heavrin's motion that Judge Stosberg recuse himself is AFFIRMED.

This is a final and appealable order.

This 23rd day of February, 2004.

/s/____________________
John G. Heyburn, II
Chief Judge, U.S. District Court

Entered February 25, 2004.

cc: Counsel of Record

UNITED STATES BANKRUPTCY COURT
FOR THE
WESTERN DISTRICT OF KENTUCKY

In Re:	)	
	)	
TRIPLE S	)	
RESTAURANTS, INC.,	)	
	)	
Debtor	)	Case No. 94-32848(3)7
	)	
J. BAXTER SCHILLING,	)	
Trustee in Bankruptcy	)	
for Triple S	)	
Restaurants, Inc.	)	
	)	
Plaintiff	)	A.P. No. 96-3128
	)	
vs.	)	
	)	
DONALD M. HEAVRIN,	)	
	)	
Defendant	)	
	)	

MEMORANDUM

The Court conducted a second trial in this case after the United Stated District Court entered a decision remanding the case for further factual findings. The U.S. District Court addressed the appeal of a prior bankruptcy court decision ordering the Defendant to disgorge all attorney fees received by the Defendant within one year of the bankruptcy filing, based on the Defendant's failure to disclose his receipt of

$153,477.71 in attorney fees under 11 U.S.C. § 329 and Bankruptcy Rule 2016(b). The District Court held:

The Bankruptcy Court concluded that "the Sixth Circuit has held that 'a complete denial of fees is the only appropriate sanction' where an attorney disregards his duty 'to fully disclose the nature and circumstances of his fee arrangement under § 329 and Rule 2016'. *In re Downs,* 103 F.3d 472, 479 (6th Cir. 1996).

After Heavrin moved to reconsider, the Court issued another Memorandum Opinion on September 18, 1998. For the most part, the Court reiterated the analysis and decisions of its first Memorandum. It reemphasized Heavrin's obligation to report fees and asserted that his failure to do so was not really a technical violation. The Court again asserted that "disgorgement of attorney's fees has been recognized by numerous other courts as being the appropriate sanction for an attorney's breach of his duty to make disclosures under § 329(a) and B.R. 2016." [citing numerous cases.] Responding to Heavrin's assertion that the court was not bound by *Downs* to require complete disgorgement, the Bankruptcy Court stated that "the Sixth Circuit does not permit the Court to exercise such discretion. *In re Downs,* 103 F.3d 472, 479 (6th Cir. 1996). It mandates disgorgement of attorney's fees for violation of disclosure requirements of § 329(a) and B.R. 2016 stating that 'a complete denial of fees is the only appropriate sanction' where there is a failure to fully disclose the nature and circumstance of the fee agreement."

Having throughly reviewed the record and the

Bankruptcy Court's memorandum, the Court concludes that the Bankruptcy Court has thoroughly documented Heavrin's services that were rendered during the one year prior to bankruptcy in contemplation of Triple S's bankruptcy. Consequently, § 329 of the Bankruptcy Code required reporting of those fees. Clearly, Heavrin failed to disclose or report those fees. The remaining question before this Court is whether *Downs* actually mandates complete disgorgement in these circumstances as the Bankruptcy Court stated or whether it has discretion. If *Downs* allows or permits discretion, then perhaps the case should be remanded for reconsideration in light of that standard. (Emphasis added).

This Court has carefully reviewed *Downs*. Comparing the facts of that case to the language explaining its disposition produces a somewhat confusing picture of a Bankruptcy Court's discretion in cases such as ours. There is no doubt that one could read *Downs* to suggest that a Bankruptcy Court has no discretion other than to order complete disgorgement of pre-petition fees where the attorney fails to disclose those fees. However, this Court takes a slightly different view. And, that difference requires the Court to remand for further review.

In *Downs*, the Sixth Circuit assumed that the attorney intentionally concealed his fee and that he engaged in a dual representation, which amounted to a conflict of interest. The Court then cited numerous cases for the proposition that where an attorney "wilfully disregarded his fiduciary duties," or "acted affirmatively" to conceal his fees or conflict of interest, or showed a "callous disregard" for his fiduciary duties, the Bankruptcy Court had no

discretion other than to order complete disgorgement of fees. This Court agrees that when a court makes such factual findings, *Downs* requires complete disgorgement. In our case the Bankruptcy Court made no such actual findings. Moreover, whether the facts warrant such a finding is unclear. This Court makes no judgment on the merits of that issue. It is clear, however, the Bankruptcy Court should not rely merely upon the *Downs'* "no discretion" language to order complete disgorgement. The Bankruptcy Court should make more complete factual findings about the nature and degree of Heavrin's fiduciary violations, if any, in order to determine whether complete disgorgement is either required or justified. Upon remand, if the Bankruptcy Court can make a finding of "callous disregard" of one's fiduciary duties or the like, then complete disgorgement is required. Complete disgorgement may be discretionary under other circumstances. Absent a finding of "callous disregard", the Bankruptcy Court should exercise its usual discretion based upon the relevant factors.
Being otherwise sufficiently advised,
IT IS HEREBY ORDERED that the Bankruptcy Court's rulings are AFFIRMED, except that the question of disgorgement of Heavrin's fee is REMANDED for further factual findings and a decision consistent with the guidance in the Memorandum.

Based on the direction of the U.S. District Court in remanding this case, this Court conducted a trial to determine two issues: 1) Whether Heavrin's failure to disclose his fee arrangement with the Debtor pursuant to § 329 and B.R. 2016(b) amounted to a "callous disregard of Heavrin's fiduciary duties" to the Debtor requiring full disgorgement of the fees he received in

the year prior to the bankruptcy filing; and 2) If complete disgorgement is not required, were the fees received by Defendant reasonable in light of the services provided, and in the Court's judgment, should any of the fees be returned to the bankruptcy estate based on the Defendant's failure to comply with the disclosure requirements of the Code and Rules.

§329. Debtor's transactions with attorneys.

(a) Any attorney representing a debtor in a case under this title, or in connection with such a case, whether or not such attorney applies for compensation under this title, shall file with the court a statement of the compensation paid or agreed to be paid, if such payment or agreement was made after one year before the date of the filing of the petition, for services rendered in contemplation of or in connection with the case by such attorney, and the source of such compensation.
(b) If such compensation exceeds the reasonable value of any such services, the court may cancel any such agreement, or order the return of any such payment, to the extent excessive, to—
  (1) the estate if the property transferred—
    (A) would have been property of the estate; or
    (B) was to be paid by or on behalf of the debtor under a plan under chapter 11, 12 or 13 of this title; or
  (2) the entity that made such payment.

Bankruptcy Rule 2016 provides:
(b) Disclosure of Compensation Paid or Promised to Attorney for Debtor. Every attorney for a debtor, whether or not the attorney applies for compensation,

shall file and transmit to the United States trustee within 15 days after the order for relief, or at another time as the court may direct, the statement required by § 329 of the Code including whether the attorney has shared or agreed to share the compensation with any other entity. The statement shall include the particulars of any such sharing or agreement to share by the attorney, but the details of any agreement for the sharing of the compensation with a member or regular associate of the attorney's law firm shall not be required. A supplemental statement shall be filed and transmitted to the United States trustee within 15 days after any payment or agreement not previously disclosed.

The U.S. District Court determined that Defendant's services to Triple S within the year preceding the filing were in connection with the bankruptcy. (See Trustee's Exh. 10 at p. 3). Therefore, the Court finds that the § 329(a) disclosure of fee arrangement statement was required to be filed by the Defendant. Defendant acknowledged that he did not file a statement of compensation received or agreements made with the Debtor regarding fees. The Defendant argued that he was not required to file these statements as he did not represent the Debtor-in-Possession; David P. Chinn was the Debtor's bankruptcy counsel. Yet, Defendant's trial testimony revealed that he continued to represent the Debtor on a certain litigation matter after the bankruptcy filing. Defendant argued that he did not engage in a callous disregard of his fiduciary duties to the estate by attempting to conceal the fees received from the Debtor as the Debtor listed the fee payments he received in the year preceding the filing on the Statement of Financial Affairs, question 21A.

Specifically, the $153,477 in issue appeared on the petition in the Debtor's answer to the question on the petition which asks for a listing of payments made to insiders within a year preceding the filing. Defendant stipulated at trial that he is an "insider" under the definition section, § 101(45), as the Defendant is the step-son of a former officer and director of the Debtor.

Factual Background

We first focus on the testimony from the Defendant concerning events leading up to the Debtor's bankruptcy filing on September 30, 1994. (See Transcript of Hearing, docket #146 at 1-18 to 1-28). With reference to Defendant's representation of Triple S Restaurants, Defendant testified that from 1988-1991, he charged $125 per hour and maintained time records, which he discarded after a year or two following payment. Defendant testified that his bills typically ran about $2,000 per month during this time period when the restaurant business was running smoothly.

In August of 1992, Defendant met with the principal officers and directors of Triple S to discuss whether the company should file Chapter 11 bankruptcy because of a severe cash flow problem and the inability to pay the debts of the company. Defendant reviewed the books, income records, and gross sales of the company and advised Triple S's officers that because the company had a number of assets but a cash shortage, Triple S should try to renegotiate payments to creditors.

By November of 1992, Triple S owed the Defendant

approximately $30,000 in accrued but unpaid attorney fees. The parties decided to enter into a Retainer Agreement whereby Triple S agreed to pay Defendant $10,000 per month for 36 months beginning 1/21/93 and continuing through 12/31/95. Defendant received approximately $60,000 under the Retainer Agreement (Trustee's Exh. 1) and in addition, billed Triple S for expenses, until May of 1994, when Defendant began deducting his expenses from the $10,000 retainer in an effort to assist the company with the cash flow problem. Defendant also testified to several fee agreements with outside counsel assisting with out-of-state litigation. (Trustee's Exh. 2)

Legal Discussion

The U.S. District Court specifically found that the Bankruptcy Court had thoroughly documented the services provided by Defendant during the year prior to bankruptcy. This Court also heard testimony about the extensive services provided by the Defendant. (See Transcript of Hearing, docket # 146). Based on the testimony of the Defendant concerning specific legal services provided to the Debtor during the relevant time period, this Court finds that Defendant provided substantial services to Triple S during the year prior to the bankruptcy filing, including litigation management, services related to employee and customer complaints, numerous attempts at debt restructuring, and day-to-day legal consultation, all of which consumed the Defendant's law practice during this time frame. Nonetheless, the Court was unable to review any written time entries to support the work performed by the Defendant due to his admitted failure to maintain any records. According to the Defendant, he did not keep records based on his

"general retainer" arrangement with the Debtor.

In accordance with the explicit directives of the U.S. District Court, the Court must determine whether the Defendant "callously disregarded" his fiduciary duty to the estate in failing to disclose his fee arrangement with the Debtor under the guidelines of 11 U.S.C. § 329(a) and Bankruptcy Rule 2016(b). The U.S. District Court fully analyzed the case of *In re Downs*, 103 F.3d 472, 478-480 (6th Cir. 1996), where the Court of Appeals ordered counsel's fees disgorged *in toto* where counsel "acted affirmatively to conceal his fee arrangement" amounting to a "callous disregard" for the fiduciary duties imposed upon counsel representing a debtor relative to disclosing all fee arrangements to the bankruptcy court, pursuant to 11 U.S.C. § 329(a) and Bankruptcy Rule 2016. *Id.* In *Downs,* the Court of Appeals discussed the egregiousness of counsel's failure to disclose the fee arrangement:

We are not faced with a simple "technical breach" of § 329 and Rule 2016 here. *Futuronics,* 655 F.2d at 471. Friedman acted affirmatively to conceal his fee arrangement with Heaven Hill and Bourbon-Aid during the § 2004 examinations of his clients and during the evidentiary hearings on remand. Friedman further refused to extricate himself from a patently obvious conflict of interest by continuing to make appearances on Hardscrabble's behalf in state court while representing the Downses in bankruptcy court. He also misled the trustee and SAIC regarding his withdrawal from the state proceedings. Only at the last possible instance, under pain of court order, did Friedman disclose the source of his retainer. Such conduct by its very essence constitutes a willful

disregard of the fiduciary duties imposed by statute.

Id. at 479-80.

In this case, the Court is unable to find that Defendant engaged in a "callous disregard" of his fiduciary duties in failing to comply with the Code and Rules. Specifically, David P. Chinn, Debtor's counsel of record, testified with reference to his discussions with Defendant regarding listing all payments received from the Debtor in the year preceding the filing in the Statement of Financial Affairs, question 21A. (See Trustee's Exhibit 4). Chinn testified that it was "his" decision to place the disclosure of Defendant's fees in this location on the petition in order to provide for full disclosure of fees paid to local counsel (the Defendant). Chinn testified that as Debtor's Chapter 11 counsel, Chinn filed the Rule 2016(b) disclosure and that he never advised Defendant to file a Rule 2016 disclosure as he believed that Defendant's fees were more appropriately disclosed in the Statement of Financial Affairs as "payments to insiders." Chinn testified that Defendant was clearly an insider as the step-son of an officer of the Debtor corporation. The Court finds Defendant's failure to file a 2016(b) statement ameliorated by Defendant's reliance on the advice of Chinn as Debtor's bankruptcy counsel.

Having now determined that Defendant's conduct does not rise to the level of "callous disregard," the U.S. District Court directs, "Absent a finding of "callous disregard", the Bankruptcy Court should exercise its usual discretion based upon the relevant factors. *Downs* is instructive on the Court's level of discretion in denying all or a portion of fees received in cases such as this, when it states, "the bankruptcy

court is given a great deal of latitude in fashioning an appropriate sanction. . ." *Id.* at 478. "When a court metes out a sanction, it must exercise such power with restraint and discretion." *Id.* "The sanction levied must thus be commensurate with the egregiousness of the conduct." *Id.* Although disgorgement in full is appropriate even where the failure to disclose is inadvertent or negligent, *In re Kisseberth,* 273 F.3d 714, 721 (6th Cir. 2001), the bankruptcy court clearly has the authority to determine the appropriate sanction for failure to disclose on a case-by-case basis. The Court is mindful of the purpose of the disclosure requirements, which is to protect both creditors and the debtor from overreaching by attorneys. *Id.* Based on the facts and circumstances of this case, the Court must sanction the Defendant to deter noncompliance with the Code and Rules by attorneys and to further the objectives of these statutory provisions. The Court, in exercising its discretion, must likewise sanction Defendant for his failure to comply with the full disclosure requirements, including his failure to maintain records of the time spent on matters pertaining to the Debtor. *See, e.g., In re Lewis,* 113 F.3d 1040, 1045 (9th Cir. 1997) (court has inherent authority to deny any and all compensation when attorney fails to meet requirements of these Code provisions). *See also, Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991) (courts have inherent power to sanction conduct abusive of the judicial process).

In this case, Defendant has steadfastly refused to amend or supplement the record with his fee arrangement with the Debtor, even after the United States District Court concluded that Defendant was required to file a fee disclosure statement. Moreover,

the Defendant has failed to sufficiently document the time spent on the Debtor's matters in the year preceding the filing, and it is not incumbent upon the Court to ferret through the Defendant's testimony to determine whether the fees are reasonable. The Defendant's inability to provide detailed time entries forces the Court to approximate a reasonable fee.

Despite Defendant's puzzling failure to disclose the fees received or adequately document his time, the Court acknowledges that the Defendant provided substantial services during the year preceding the bankruptcy and recognizes his efforts merit compensation. Employing the guidelines articulated by the United States District Court, and after weighing the failure to comply with the disclosure requirements and inadequate documentation against the extensive testimony regarding the work actually performed, the Court determines that a 30% reduction of the amount received by the Defendant in the year preceding the bankruptcy filing, $153,477.71, is appropriate. We have entered a Judgment requiring the Defendant to disgorge $46,043.32 of this fee, which shall be paid to the Trustee, J. Baxter Schilling, for distribution to creditors in this case.

/s/___________________
David Stosberg
United States Bankruptcy Judge

November 20

UNITED STATES BANKRUPTCY COURT
FOR THE
WESTERN DISTRICT OF KENTUCKY

In Re:	)	
	)	
TRIPLE S	)	
RESTAURANTS, INC.,	)	
	)	
Debtor	)	Case No. 94-32848(3)7
	)	
J. BAXTER SCHILLING,	)	
Trustee in Bankruptcy	)	
for Triple S	)	
Restaurants, Inc.	)	
	)	
Plaintiff	)	A.P. No. 96-3128
	)	
vs.	)	
	)	
DONALD M. HEAVRIN,	)	
	)	
Defendant	)	
	)	

JUDGMENT

Pursuant to the Court's Memorandum entered this same date and incorporated herein by reference,

IT IS ORDERED that the Plaintiff recover the sum of $46,043.32 from the Defendant, which shall bear interest at the federal judgment rate.

This is a final and appealable judgment and there is no just cause for delay.

/s/______________________

David Stosberg

United States Bankruptcy Judge

November 20.

11 U.S.C. § 329

§ 329. Debtor's transactions with attorneys

(a) Any attorney representing a debtor in a case under this title, or in connection with such a case, whether or not such attorney applies for compensation under this title, shall file with the court a statement of the compensation paid or agreed to be paid, if such payment or agreement was made after one year before the date of the filing of the petition, for services rendered or to be rendered in contemplation of or in connection with the case by such attorney, and the source of such compensation.

(b) If such compensation exceeds the reasonable value of any such services, the court may cancel any such agreement, or order the return of any such payment, to the extent excessive, to—

(1) the estate, if the property transferred—

(A) would have been property of the estate; or

(B) was to be paid by or on behalf of the debtor under a plan under chapter 11, 12, or 13 of this title; or

(2) the entity that made such payment.

Federal Rules of Bankruptcy Procedure, Rule 2016

Rule 2016. Compensation for Services Rendered and Reimbursement of Expenses

(a) Application for compensation or reimbursement.

An entity seeking interim or final compensation for services, or reimbursement of necessary expenses, from the estate shall file an application setting forth a detailed statement of (1) the services rendered, time expended and expenses incurred, and (2) the amounts requested. An application for compensation shall include a statement as to what payments have theretofore been made or promised to the applicant for services rendered or to be rendered in any capacity whatsoever in connection with the case, the source of the compensation so paid or promised, whether any compensation previously received has been shared and whether an agreement or understanding exists between the applicant and any other entity for the sharing of compensation received or to be received for services rendered in or in connection with the case, and the particulars of any sharing of compensation or agreement or understanding therefor, except that details of any agreement by the applicant for the sharing of compensation as a member or regular associate of a firm of lawyers or accountants shall not be required. The requirements of this subdivision shall apply to an application for compensation for services rendered by an attorney or accountant even though the application is filed by a creditor or other entity. Unless the case is a chapter 9

municipality case, the applicant shall transmit to the United States trustee a copy of the application.

(b) Disclosure of compensation paid or promised to attorney for debtor.

Every attorney for a debtor, whether or not the attorney applies for compensation, shall file and transmit to the United States trustee within 15 days after the order for relief, or at another time as the court may direct, the statement required by § 329 of the Code including whether the attorney has shared or agreed to share the compensation with any other entity. The statement shall include the particulars of any such sharing or agreement to share by the attorney, but the details of any agreement for the sharing of the compensation with a member or regular associate of the attorney's law firm shall not be required. A supplemental statement shall be filed and transmitted to the United States trustee within 15 days after any payment or agreement not previously disclosed.

(c) Disclosure of compensation paid or promised to bankruptcy petition preparer.

Every bankruptcy petition preparer for a debtor shall file a declaration under penalty of perjury and transmit the declaration to the United States trustee within 10 days after the date of the filing of the petition, or at another time as the court may direct, as required by § 110(h)(1). The declaration must disclose any fee, and the source of any fee, received from or on behalf of the debtor within 12 months of the filing of the case and all unpaid fees charged to the debtor. The declaration must describe the services

performed and documents prepared or caused to be prepared by the bankruptcy petition preparer. A supplemental statement shall be filed within 10 days after any payment or agreement not previously disclosed.

Federal Rules of Bankruptcy Procedure, Rule 2017

Rule 2017. Examination of Debtor's Transactions with Debtor's Attorney

(a) Payment or transfer to attorney before order for relief.

On motion by any party in interest or on the court's own initiative, the court after notice and a hearing may determine whether any payment of money or any transfer of property by the debtor, made directly or indirectly and in contemplation of the filing of a petition under the Code by or against the debtor or before entry of the order for relief in an involuntary case, to an attorney for services rendered or to be rendered is excessive.

(b) Payment or transfer to attorney after order for relief.

On motion by the debtor, the United States trustee, or on the court's own initiative, the court after notice and a hearing may determine whether any payment of money or any transfer of property, or any agreement therefor, by the debtor to an attorney after entry of an order for relief in a case under the Code is excessive, whether the payment or transfer is made or is to be made directly or indirectly, if the payment, transfer, or agreement therefor is for services in any way related to the case.

No. 05-508

In the Supreme Court of the United States

DONALD M. HEAVRIN,

Petitioner,

v.

J. BAXTER SCHILLING,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

J. BAXTER SCHILLLING
Counsel of Record

1513 SOUTH FOURTH STREET
LOUISVILLE, KY 40208
(502) 636-2031

Attorney for Respondent

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QUESTIONS PRESENTED

Petitioner, Donald M. Heavrin, a Louisville, Kentucky attorney received not less than $153,477.71 for legal services performed within one year before Triple S Restaurants, Inc., filed a Chapter 11 bankruptcy petition. The bankruptcy court found that Heavrin's legal services were performed in contemplation of and in connection with Triple S Restaurants, Inc.'s bankruptcy case; therefore, the disclosure of fee requirements contained in 11 U.S.C. §329(a) and Bankruptcy Rule of Procedure 2016(b) applied to Heavrin. Heavrin steadfastly refused to comply with any of the applicable disclosure requirements. As a result of Heavrin's violation of bankruptcy statutes and rules as well as other facts and circumstances in the case, Heavrin was ordered to disgorge $46,043.32 in attorney fees he received from Triple S Restaurants. Heavrin appealed to the district court, which reversed. The Sixth Circuit reversed the district court.

The Petition raised two questions:

I. Does an attorney who does not participate in bankruptcy proceedings have a duty to submit detailed disclosures of all pre-petition payments received, pursuant to 11 U.S.C. §329 and Bankruptcy Rule 2016, and does the bankruptcy court have jurisdiction to sanction an attorney not participating in bankruptcy proceedings for failing to make such disclosures?

II. Did the Court of Appeals' construction of 11 U.S.C. §329, subjecting attorneys not before the bankruptcy court to sanctions for nondisclosure of pre-petition fee arrangements, and retroactively applying this judicial expansion of the narrow, precise statutory language of §329 to Petitioner in an unpublished decision that lacks prospectivity, violate Petitioner's right to due process?

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INTRODUCTION

In this case the United States Court of Appeals for the Sixth Circuit (herein Sixth Circuit), in a per curiam opinion, upheld the well-settled law that requires an attorney who performs legal services in contemplation of or in connection with a debtor's bankruptcy case to file a fee disclosure statement with the bankruptcy court pursuant to 11 U.S.C. §329 and applicable Bankruptcy Rules of Procedure (herein BRP). There is no conflict in the Circuits on this well-settled law.

As the Sixth Circuit stated in its analysis, this case involved two straight forward questions. (Pet. Apx. A8.) The first was whether the legal services which the Petitioner, Donald M. Heavrin (herein Heavrin), performed for the debtor during the year preceding the filing of the debtor's bankruptcy petition were "in contemplation of" or "in connection with" the debtor's bankruptcy case. (Pet. Apx. A8-A9.) The second question was whether the bankruptcy court abused its discretion in requiring partial disgorgement of fees paid to Heavrin because he violated 11 U.S.C. §329(a) and BRP 2016(b). (Pet. Apx. A8.)

The first of these straight forward questions was answered by the Sixth Circuit through application of this Court's analysis in *Conrad, Ruben & Lesser v. Pender*, 289 U.S. 472 (1933). The Sixth Circuit's analysis of *Conrad* demonstrates that the legal services which Heavrin provided to the debtor within one year before it filed its Chapter 11 bankruptcy petition were both in contemplation of and in connection with the debtor's bankruptcy case; hence, §329 of the Bankruptcy Code and certain Bankruptcy Rules of Procedure required Heavrin to disclose the legal fees he was paid by Triple S Restaurants, Inc., (herein debtor or TSR), within one year

before TSR filed its Chapter 11 bankruptcy petition, the source of those payments and certain fee sharing arrangements he had relating to those payments.

The second question, which related to the alleged abuse of discretion by the bankruptcy court in ordering a 30% disgorgement of fees, was also properly decided by the Sixth Circuit. The Sixth Circuit rejected Heavrin's argument that the partial disgorgement constituted an abuse of discretion stating, "if anything" the partial disgorgement order was "unduly generous to Heavrin." (Pet. Apx. A12.)

Contrary to Petitioner's argument, the law in this area is well-settled and was properly applied by the Sixth Circuit. Further there is no conflict in the Circuits. There is also no valid constitutional issue involved in this case and no constitutional law argument was ever raised previously in the case. Thus, there is no reason for this Court to grant the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

In 1987-1988, Robert Harrod (herein Harrod), and Michael Macatee (herein Macatee), formed TSR for the purpose of purchasing from Sizzler International, Inc., the Louisville, Kentucky franchise rights to Sizzler Restaurants, a national chain of steakhouse restaurants. Heavrin is a Louisville, Kentucky attorney and the son [1] of Harrod. Heavrin acted as corporate counsel to TSR from the date of its

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[1] While Harrod was not Heavrin's biological father, Harrod is the only father Heavrin knew and they maintained a close father-son relationship prior to Harrod's death in 1994.

incorporation until TSR filed its Chapter 11 bankruptcy petition in September, 1994.

Within a couple of years after its incorporation, TSR began to experience financial problems. TSR's accountant, Innes Mather (herein Mather), testified at trial that TSR's financial condition deteriorated severely during TSR's fiscal year of October, 1990 through October, 1991. Mather further testified he attempted to restructure TSR's financial affairs in early 1992, which efforts were unsuccessful.

After Mather's attempts to restructure TSR's financial obligations failed, TSR's financial condition worsened. In August, 1992 Heavrin admitted that Harrod and Macatee told him that TSR could no longer pay its debt service and "wanted to file a Chapter 11 petition that very afternoon." Contrary to Mather's financial analysis and TSR's own assessment of its financial condition, Heavrin advised TSR not to file Chapter 11 because he believed that TSR merely had a "cash flow crunch", which difficulties could be corrected through his negotiations with TSR's creditors. (Pet. Apx. A3.)

In August, 1992, when Heavrin advised TSR not to file a Chapter 11 bankruptcy petition, he was billing TSR for his legal fees at the rate of $125 per hour, and, on the high side, charged TSR about $2,000 per month for his legal services. From August, 1992 until November, 1992, Heavrin sent TSR monthly statements for his legal services, which billings TSR paid in full. Heavrin contended at trial that while TSR paid, in full, his tendered invoices, he was not billing TSR for all of his services. Instead, Heavrin claimed that he kept in a "separate drawer" time records which reflected that TSR owed him an additional $30,000 for legal services. None of the unbilled time records was produced by Heavrin at trial nor

did Heavrin produce any documents at trial which showed he was actually owed $30,000 by TSR as of November, 1992.

At trial, Heavrin claimed that in November, 1992 he and his now deceased father had a conversation in which Harrod allegedly told Heavrin that TSR could not pay Heavrin the $30,000 in unbilled legal fees, and that Harrod proposed the following solution: TSR would put Heavrin on a retainer starting January 1, 1993 at the rate of $10,000 per month for 36 months, that in 3 months Heavrin would be current on the money TSR owed to him, and, thereafter, Heavrin would have a "heck of a deal."

A "retainer agreement" was signed by TSR and Heavrin on December 4, 1992. Heavrin testified that to receive the retainer payment of $10,000 per month from TSR he was required to provide legal services to TSR concerning its various negotiations with creditors, defend TSR in lawsuits filed in courts in which he was licensed to practice law and to defend TSR in lawsuits in courts in which he could appear *pro hac vice*.

At trial Heavrin testified at length about the legal services he provided to TSR during the year before TSR filed its bankruptcy petition. Heavrin's legal services included negotiations with various creditors to restructure debts or obligations which TSR owed. Further, Heavrin defended or participated in the legal defense of lawsuits filed by various of TSR's creditors to evict TSR from restaurants located in Kentucky, Indiana and Ohio. Sizzler International sued TSR for failure to pay various obligations including royalties and also sought to remove TSR as a Sizzler franchisee. Heavrin participated in the defense of the Sizzler International lawsuit. During the year before TSR filed bankruptcy, Heavrin also defended TSR in a lawsuit filed by Sysco, TSR's major food

distributor, to collect over $815,000 owed to it. In September, 1994, one of TSR's creditors obtained judgment and executed on one of TSR's bank accounts, which execution forced TSR into bankruptcy.

On September 30, 1994, TSR filed a Chapter 11 bankruptcy petition. David Chinn, an attorney who shared office space with Heavrin, signed the TSR bankruptcy petition. In response to Question 21 on the Statement of Financial Affairs relating to "payments to insiders", TSR prepared a list of 13 different "insiders" of TSR who had received payments from TSR within one year prior to its Chapter 11 filing. One of the individuals on the list of insiders who had received payments from TSR was Heavrin, who was listed as having received $153,477.71. Within 10 weeks after filing its Chapter 11 bankruptcy petition, TSR's bankruptcy case was converted to a Chapter 7 bankruptcy liquidation.

The Chapter 7 Trustee in bankruptcy for TSR filed a Complaint against Heavrin seeking to recover from Heavrin the $153,477.71 which he had received from TSR during the year prior to the filing of its Chapter 11 petition. Under one of the Counts in the Complaint filed by the Trustee against Heavrin, the Trustee sought disgorgement of fees paid to Heavrin for his violation of 11 U.S.C. §329(a) and BRP 2016.[2]

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[2] Throughout the entire eleven years during which TSR's bankruptcy case has been pending, Heavrin has steadfastly refused to file any fee disclosures required under 11 U.S.C. §329(a) and BRP 2016(b).

Bankruptcy Judge J. Wendell Roberts presided in the Trustee's lawsuit against Heavrin. Bankruptcy Judge Roberts twice ruled that Heavrin's actions constituted a "callous disregard" for the attorney fee disclosure requirements of 11 U.S.C. 329, and he ordered Heavrin to disgorge totally all fees TSR paid to him within one year before it filed its bankruptcy petition. Twice the United States District Court for the Western District of Kentucky reversed Bankruptcy Judge Roberts decisions, and in the second reversal required that an evidentiary hearing be held.

An evidentiary hearing concerning the Trustee's disgorgement claims against Heavrin was then held.[3] The presiding judge at the trial was Bankruptcy Judge David T. Stosberg, Chief Judge of the United States Bankruptcy Court for the Western District of Kentucky. After several days of testimony and the submission of briefs, Bankruptcy Judge Stosberg issued his decision in which he held that Heavrin had violated 11 U.S.C. §329 and required that he disgorge $46,043.32 of the money paid to him by TSR, which sum is 30% of the monies Heavrin received from TSR during the year preceding the filing of its bankruptcy petition. Heavrin appealed.

On appeal, the district court again reversed the bankruptcy court's decision and held that 11 U.S.C. §329 did not apply to Heavrin (notwithstanding in its earlier decision the district court had held that 11 U.S.C. §329 did apply to Heavrin). The Trustee in bankruptcy for TSR appealed.

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[3] On motion of Heavrin, Bankruptcy Judge Roberts recused himself prior to the evidentiary hearing.